IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8743 OF 2004

Shri Jagdish Manohar Nevalkar ... Petitioner

v/s

Shri Balkrishna Anant Paradkar and others ... Respondents

Mr A.S. Khandeparkar for Petitioner.

Mr N.Y. Gupte for Respondent No.1.

CORAM : D.K. DESHMUKH J.

DATE : 20TH JULY 2005.

P.C. :-

1. Rule, returnable forthwith. Heard finally by consent of the parties.

2. In the civil suit, by consent of parties, a decree was passed whereby the respondents were given a right of way. The execution was filed by the petitioner. While executing the decree, the only objection raised is the ditches are found on the way. The Commissioner was appointed, he submitted his report and as per his report, the ditches are to be found in the land of Patkar, who has purchased the land from Kamat. Both Patkar and Kamat were not parties to the civil suit. Therefore, the Executing Court should have considered this aspect of the matter. Perusal of the impugned order shows that instead of considering this aspect of the matter that the ditches are not found in the land of the judgment debtor, the Executing Court has attached the property of the judgment debtor. In my opinion, therefore, the order impugned suffers from non-application of mind. I do not find that the judgment debtor has disobeyed the decree. The question of disobeying the decree would arise only if the Executing Court finds that the ditches were dug by the

judgment debtor in his own land. There is no such allegation and even the land where ditches are found by the Commissioner does not belong to the petitioners. It is thus clear that the order impugned suffers from non-application of mind to the relevant aspect. In the result therefore, petition succeeds and is allowed, rule is made absolute in terms of prayer clause (a). No order as to costs.

. Parties to act on the copy of this order duly authenticated by the Sheristedar / Personal Secretary of this Court as true copy.

. Certified copy expedited.